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No. 71-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

POST-NEWSWEEK STATIONS,
CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES' MOVE
FOR VIETNAM PEACE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

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TABLE OF CONTENTS

	Page
REPLY	1
I. BEM'S ARGUMENTS ARE DIRECTED NOT TO SECURING ITS OWN INTERESTS IN FREE SPEECH, WHICH HAVE NOT BEEN IMPAIRED, BUT TO PROMOTING GENERAL POLICY CHANGES IN BROADCASTING OPERATIONS BASED ON UNPROVED AND DISPUTED FACTUAL PREMISES	2
II. THERE ARE NO DOCTRINES OR DECISIONS OF THIS COURT, INTERPRETING EITHER THE FIRST AMENDMENT OR EQUAL PROTECTION PRINCIPLES, THAT REQUIRE BROADCAST STATIONS TO ADOPT A GENERAL POLICY OF SELLING SPOT ANNOUNCEMENT TIME FOR EDITORIAL ADVERTISING	10
III. RECENT DECISIONS OF THIS COURT CONFIRM THAT THE STATE ACTION CONCEPT DOES NOT PROPERLY APPLY TO BROADCASTING POLICY JUDGMENTS MADE BY INDIVIDUAL STATIONS AND NEITHER INSTIGATED NOR COMPELLED BY THE COMMISSION	20
CONCLUSION	27

TABLE OF CITATIONS

Cases:

Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)	24
American Trucking Ass'ns, Inc. v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967)	20
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961)	21, 24, 26

Fowler v. *Rhode Island*, 345 U.S. 67 (1953) 10

Marsh v. *Alabama*, 326 U.S. 501 (1946) 26

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 22, 23-24

Niemotko v. *Maryland*, 340 U.S. 268 (1951) 10, 26

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 12, 26

Office of Communication of The United Church of Christ v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) 17

Police Department v. *Mosley*, 40 U.S.L. Wk. 4877 (June 26, 1972) 15

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) . 12, 14, 17

Reitman v. *Mulkey*, 387 U.S. 369 (1967) 24

Terminiello v. *Chicago*, 337 U.S. 1 (1949) 10

Tinker v. *Des Moines School District*, 393 U.S. 503 (1969) 10

FCC Decisions and Reports:

Communication Workers of America, 31 F.C.C.2d 841 (1971) 4

Homer P. Rainey, 11 F.C.C. 898 (1947) 18-19

Cullman Broadcasting Co., 40 F.C.C. 576 (1963) 7-8, 13

Lloyd Corp. v. *Tanner*, 40 U.S.L. Wk. 4829 (June 29, 1972) 22-24

Masters Broadcasting Corp., 6 P & F R.R. 621 (1950) 16

Robert Harold Scott, 11 F.C.C. 372 (1946) 18-19

Study of Fairness Doctrine, 30 F.C.C.2d 26 (1971) 9

United Broadcasting Co., 10 F.C.C. 515 (1945) 18-20

Voice of Brooklyn, Inc., 8 F.C.C. 230 (1940) 16

Constitution and Statutes:

First Amendment, U.S. Constitution . . . . . *passim*

Communications Act of 1934,
47 U.S.C. § 151 *et seq.*:

Section 3(h), 47 U.S.C. §153(h) 18

Section 315, 47 U.S.C. § 315 14

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REPLY BRIEF FOR POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.

This reply brief is filed by Post-Newsweek Stations, Capital Area, Inc. ("WTOP"), in response to the brief filed by Business Executives' Move for Vietnam Peace ("BEM").

I. BEM'S ARGUMENTS ARE DIRECTED NOT TO SECURING ITS OWN INTERESTS IN FREE SPEECH, WHICH HAVE NOT BEEN IMPAIRED, BUT TO PROMOTING GENERAL POLICY CHANGES IN BROADCASTING OPERATIONS BASED ON UNPROVED AND DISPUTED FACTUAL PREMISES.

BEM has not been denied an opportunity to use radio broadcasting to air its editorial advertisements. At least five stations in the District of Columbia area have carried BEM's announcements (A. 329). There is nothing in the record to indicate that BEM has been or would be unable to secure air time on a number of other stations among the 43 stations that serve the area if it wished to do so (see A. 329). No basis exists for suggesting that editorial advertisements must be made compulsory for WTOP in order to satisfy BEM's desire to use the airwaves to convey its message.[1]

Similarly, WTOP's audience has not been denied access to BEM's views. That audience is not a discrete group which is insulated from other stations or other media and can be reached solely by broadcasts on WTOP. In any event, the very views embodied in BEM's advertisements were "expressed on a number of occasions in various types of broadcasts over WTOP" (A. 352), and WTOP provided substantial coverage of the range of partisan viewpoints and opinions about the Vietnam war (A. 313-15, 352; see A. 360-64). Although BEM once claimed that WTOP had not fairly presented the BEM

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[1] While BEM now asserts that WTOP's audience is "unique" in terms that suggest that such listeners can be reached only over WTOP (BEM Br. 3, 77-78), BEM made no effort to establish this assertion when the case was before the Commission and it certainly cannot do so in the appellate courts.

viewpoint on the war (A. 292-94)—a claim rejected by the Federal Communications Commission on the record—it abandoned that charge below as its own brief now concedes. BEM Br. 7, n. 12.

In short, BEM has not been prevented from broadcasting its views and WTOP's audience has been exposed by broadcasts on that station to BEM's viewpoint. There is thus strikingly absent in this case the kind of concrete interference with personal self-expression or with the receipt of information by an audience that is the gravamen of free speech claims. BEM's argument reflects its discomfort with the particular circumstances of this case. It is directed to the general policy on editorial advertising maintained by WTOP and various other stations which BEM believes should be altered by the stations and replaced by a uniform regime it considers to be wiser and more desirable.

BEM's argument rests importantly on general factual propositions that have nothing to do with what happened in this case. Thus, BEM argues that the fairness doctrine is inadequate to curb alleged abuses by broadcasters (BEM Br. 33-40); that editorial advertising is a fair and efficient way to promote coverage of public issues (*id.* 49-54); and that no adverse effects worth weighing will result from the regime that BEM advocates (*e.g.*, *id.* 59-61). Such arguments would be familiar grist in a congressional revision of the Communications Act or in the FCC investigation of the fairness doctrine now underway, but they have no bearing on the question whether WTOP's action in this case has infringed BEM's constitutional rights. Moreover, the caricature of broadcasting offered by BEM's brief would not be a sound basis for any regulatory measure. The propositions advanced by BEM are based on a one-sided picture of the

broadcast industry and reflect serious misconceptions about broadcast operations.[2] The very incidents used to demonstrate the propositions are in a number of cases described inaccurately or in misleading terms.

Thus, to prove the supposed abuses of broadcasters under the fairness doctrine, BEM's brief provides a page of examples to show how "controversial subjects" have been "avoided" by broadcasters. BEM Br. 37, n. 55. The very first example is a capsule description of *Communication Workers of America*, 31 F.C.C. 2d 841 (1971), phrased to suggest that a labor union was prevented by two networks from making known its views on a major labor settlement. In fact, the union had purchased time for this purpose on a number of other stations in the same communities. *Id.* Furthermore, the messages were basically directed not to informing the listening public but to encouraging union members to follow the union's policy on contract ratification. See 31 F.C.C.2d at 841-42. With these clarifications, the incident hardly shows that the union was denied access to the airwaves or that the public was deprived of adequate information on public issues. What the example does principally

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[2] DNC, in addition to abusing broadcasters at large, goes a step beyond in seeking to describe the industry as though it consisted of three networks jointly controlling all news and informational programs. See, *e.g.*, DNC Br. 14, 44-45, 51, 61. In fact, there are over seven thousand radio and television broadcast stations in this country (see WTOP's opening brief at 54 n. 56) and most of them have no connection with the major networks. WTOP and WTOP-TV, although network affiliates, carry far more locally originated news than network news. Needless to say, DNC does not attempt to support its generalizations or assumptions about the role of the networks with any concrete data.

demonstrate is the hazards of proof by selective sampling in an appellate brief.[3]

BEM's advocacy of editorial advertising is also based on a shaky factual foundation. For example, BEM cites advertising rates of several stations to prove that a small sum will enable the editorial advertiser to communicate with thousands of listeners. BEM Br. 4. The illustrations aim to show that such advertisements are an efficient vehicle for the less affluent and that no real risk exists that editorial advertising would be dominated by the wealthy. *Id.* 50-54. BEM's beguiling price data overlooks an obvious fact of broadcast advertising; the cost of an effective advertising campaign is not established by the price of an individual 30 or 60 second spot; virtually any effective campaign requires repetition of such spots at predetermined times in substantial numbers.[4] The cumulative cost of an advertising campaign on radio is many times the individual figures offered by BEM, and it is vastly greater for television.

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[3]Even more tendentious is an assertion, again dehors the record, in the same BEM footnote that WTOP's sister station in Jacksonville, Florida "reportedly" discharged a newsman "because he caused advertising account cancellations." The report, which appeared in a story in a news periodical, was in fact false. The periodical subsequently agreed not to permit the reprinting of the story.

[4]Consonantly, broadcast statistics are often given in terms of the cumulative listenership during a period. Thus, a station's "weekly cume" of listeners over 12 years of age (*e.g.*, WTOP pamphlet, reprinted as BEM Br. App. B) would include all persons in that category although many of them might listen only infrequently or for relatively brief and intermittent periods during the week. In order to have a significant chance to reach such listeners, a series of spots during the week would have to be broadcast.

BEM is, finally, unpersuasive in seeking to brush aside the danger that compulsory access would inundate the Commission and the courts with disputes over the sale of editorial advertising time, its placement, its cost, discrimination among advertisers, and countless other matters. When BEM asserts that a multitude of such disputes and their litigation is "a development . . . to be anticipated and welcomed" (BEM Br. 60), it betrays ignorance of the impact on broadcasting, not to speak of the effect on the Commission and the courts. The costs in station personnel time, diverted attention, and financial expense of this endless parade of major and minor controversies over what is and is not broadcast inevitably means that less time and resources can be devoted to assuring the scope and quality of a station's programming.[5]

The new access regime, if instituted, is likely to involve a far greater operational burden than that resulting from the fairness doctrine. A substantial number of new controversies may reasonably be expected to result from compulsory access;[6] the broadcast of editorial advertise-

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[5]The record in the DNC case graphically illustrates the burden already placed on broadcaster time and energy by such controversies. To establish its fair coverage in one area, a network obviously devoted hundreds of working hours to compiling an exhibit running well over a hundred pages and covering months of broadcasts. See A. 81-242.

[6]The fairness doctrine imposes an obligation running to the public which is satisfied by balanced coverage. BEM's asserted right is personal to individuals and groups and—as the present case illustrates—can be pursued even though the station has provided fair coverage of the issue. Needless to say, neither the present volume or quality of editorial advertisements on stations that carry them now is any index of what would occur if all stations were required to carry them with few, if any, restrictions on content.

ments itself may result in still further obligations and create additional disputes;[7] and the flexibility that made the fairness doctrine workable would disappear in a panoply of inflexible rules which BEM's own brief prefigures and which would embroil the Commission and the courts in repeated constitutional determinations. See pp. 25-26, *infra*. For BEM to brush aside the practical consequences of a new complex of guidelines and controversies upon the day-to-day operations of broadcasters does not reflect an understanding, let alone a serious appraisal, of the matter.

Virtually from the start of the case advocates of editorial advertising have oscillated from one position to another in seeking to answer the practical objections to their regime, often abandoning successive positions as objections to them are raised. Thus, for example, BEM asserted at the outset that it was simply a regrettable circumstance if editorial advertising led to domination of the issues by the wealthy.[8] BEM's most recent brief in this Court asserts, however, that the licensee can make selections that will avoid this problem (BEM Br. 52-53)

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[7] Unless the fairness doctrine is suspended, such advertisements may require changes in the station's other programming. The possible application of *Cullman* would give rise to further problems relating to whether and when a station was financially liable for such changes. Moreover, each such broadcast widens the opportunity for charges of discrimination if subsequent advertisements from other sources are rejected.

[8] BEM stated:

> "WTOP worries that, if stations must sell air time for issue-oriented advertisements, editorial advertising will be dominated by wealthy speakers. But this is what commercial broadcasting is all about; he who can afford it buys time, be it for commercial, political, or other purposes" (A. 347).

and that the licensees are required, in any event, "to cover fairly all representative viewpoints." *Id.* 57. Yet in the same brief BEM casts substantial doubt on the propriety of any licensee discretion (see pp. 25-26, *infra*) and it announces that the *Cullman* doctrine, a significant aspect of the fairness obligation, could be suspended in part. *Id.* 58. This last prospect—apparently a semi-fairness obligation—appears finally to bring BEM to a third position, halfway between its original extremes, but no more workable than either.

Beyond the particular misconceptions or incomplete analyses, there is a more basic problem in BEM's method. The factual premises BEM now relies on have not been submitted by BEM to the agency having expert responsibility for broadcasting. Almost none of the episodes and incidents BEM advances here to impeach the fairness doctrine was mentioned when this case was before the Commission. BEM never sought to prove at that stage that WTOP's audience was uniquely available through that station. The advertising cost data BEM offers and the factual inferences it draws have been tendered for the first time in this Court. In substance, BEM is now attempting, after the case has left the fact-finding level, to build a new record free from the constraints of agency scrutiny.[9]

This approach would be unsound even if the factual context were far less complicated than it is in this instance. The practical operation of the fairness doctrine,

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[9]The administrative record in this case shows that BEM's arguments to the FCC in favor of editorial advertisements were almost entirely doctrinal and with very few exceptions the incidents and data now comprising an important part of BEM's case were never presented to the agency. See, *e.g.*, A. 291, 320.

the actual costs of radio advertising campaigns, the relative uniqueness of or overlap among audiences of different radio stations, and the consequences of increased agency and court regulation for broadcasters are not matters to lend themselves to hasty appraisal made on the basis of selective examples in an appellate brief. If issues of this kind are to be evaluated, it should be done in the first instance in proceedings before the Commission and subject to judicial review only after the initial agency screening process has been completed.

BEM's effort to compose its record in the course of an appeal in this case is ironical because the agency is now engaged in a broad-gauged proceeding to evaluate the fairness doctrine and consider alternatives such as editorial advertising. *Study of Fairness Doctrine*, 30 F.C.C. 2d 26 (1971). The Commission is there considering the very issues BEM seeks to resolve in this case on the basis of untested factual assertions that it supports, if at all, on the basis of selected examples. The current Commission proceedings are the forum in which BEM can properly seek to impeach the fairness doctrine based on its practical operation and seek to show that editorial advertisements are so desirable a supplement that they should be made compulsory for all stations. When the Commission has made its determinations, any aggrieved party may seek review in the courts on the basis of an adequate administrative record.

In sum, BEM's doctrinal arguments must be considered without the coloration or reinforcement that might be lent to them if it were *in fact* established that the fairness doctrine did not operate effectively or that editorial advertising was a fair and workable tool for enhancing public understanding of complex issues. There is only one concrete episode that was litigated in the agency proceed-

ing in this case—WTOP's coverage of the Vietnam war. Having abandoned its claim that its own viewpoint was not fairly covered by WTOP, BEM is in no position to ask the Court to decide this suit on the basis of unproved allegations that broadcasters have in other cases failed to provide fair coverage of controversial issues.

II. THERE ARE NO DOCTRINES OR DECISIONS OF THIS COURT, INTERPRETING EITHER THE FIRST AMENDMENT OR EQUAL PROTECTION PRINCIPLES, THAT REQUIRE BROADCAST STATIONS TO ADOPT A GENERAL POLICY OF SELLING SPOT ANNOUNCEMENT TIME FOR EDITORIAL ADVERTISING.

BEM's doctrinal argument, like its "factual" one, is necessarily detached from the circumstances of this case. The Commission has not interfered with any arrangements between BEM and individual broadcasters; a number of stations in the District of Columbia area have carried BEM's messages; and WTOP's own listeners have been fully and fairly informed of the viewpoints expressed in those messages through various means including partisan voices. The present case is thus remote from the classic First Amendment cases, prolifically cited by BEM, in which the state has sought to prevent expression of an opinion based on the viewpoint expressed or style of expression, or in which it has invidiously favored one sect or viewpoint on a subject as against a conflicting one.[10]

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[10] *E.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) (riotous language); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969) (antiwar protest); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (preference among religious viewpoints); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (same).

Bypassing the circumstances of its own case and the factual differences between it and the decisions on which it relies, BEM seeks to derive from those decisions several abstract legal principles that it asserts entitle it to prevail without regard to whether it has broadcast its message on other stations or whether its viewpoint has been fairly communicated to WTOP's audience. One formula relied on by BEM is its right of "self-expression" (BEM Br. 24-29); another is a charge that broadcasters engage in "censorship" of ideas (*id.* 22-23); yet another is a supposed prohibition on every difference in treatment of speech based upon its "content" (*id.* 14-20). The generalizations BEM wrongly attributes to decisions of this Court do not withstand analysis.

It is understandable that BEM should heavily emphasize its interest in "self-expression" since it cannot claim that WTOP's audience has been deprived of access to ideas that BEM advocates. It hardly follows, however, that "an individual's interest in expressing [his ideas] and doing so in his own way" (BEM Br. 28, quoting the court below) is a mandate to command the use of a particular radio station. There is no general prohibition that prevents BEM from expressing its views on the Vietnam war in any medium it chooses including radio stations in the District of Columbia area, and it has in fact broadcast editorial advertisements on such stations. The question here is whether the Constitution requires an individual station to carry BEM's advertisements even though it has fully and fairly covered the same issues in other programming.

No decisions in this Court exalt BEM's interest in self-expression into a right to require that a particular printing press, microphone or other media facility be placed at its disposal. BEM's pastiche of quotations

derives from cases that are remote from the present subject and do not suggest even as dicta that self-expression overcomes every other competing value, interest or right.[11] Any contrary contention is especially inapt in the context of broadcasting. There this Court's leading decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), emphasizes that it is the public's interest as listeners which is "paramount" rather than private claims to use the microphone, whether they are made by broadcasters or by private "individuals who want to broadcast." 395 U.S. at 388-90.

BEM's repeated epithets against "censorship" (BEM Br. 22-24) are equally wide of the mark. The necessity of choosing among competing claims to broadcast time is inescapable in light of numerous proponents, limited spectrum space, the range of controversial issues deserving attention, the public's interest in hearing all sides of an issue, and other interests and constraints that affect the broadcast media. It is an abuse of language to describe as censorship a process in which thousands of broadcasters reach individual decisions about programming and broadcast policy, subject to limited oversight by the FCC and to review in the courts.[12] Censorship in

[11] For example, BEM cites *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as recognizing "the individual's interest in access to the press." See BEM Br. 28 n. 42 and 376 U.S. at 266. Yet that decision, while qualifying restraints placed by the libel laws on newspapers carrying political advertising, also recognized the individual's interest in protection from deliberate or malicious falsehood implemented through "self-expression." Nothing in the opinion suggested that any newspaper was obligated by the First Amendment to carry the particular political advertisement there in question or any political advertising whatever.

[12] It is also fanciful for BEM to assert that within an individual station the licensee "arrogates for himself the right to speak for all the others" who hold controversial views (BEM Br. 11). A great

any meaningful sense—uniform government determination of what should and should not be said—is in fact made more likely by the decision below precisely because it threatens to bring about a greater involvement of the Commission in broadcaster decision-making. See WTOP Br. 29-33.

BEM's own brief recognizes that individual choices could not be avoided even if its own regime were adopted. BEM actually invokes broadcaster discretion in order to remedy dangers posed by its own regime, such as undue domination by a "narrow viewpoint," defamatory attacks on individuals, and economic hardship that would result if the *Cullman* doctrine were applied to editorial advertisements. See BEM Br. 52-61.[13] There is no logic to the contrapuntal theme of BEM's brief, condemning broadcaster discretion as "censorship" in one paragraph and invoking it in the next as an answer to deficiencies in BEM's proposals. BEM's qualifications on its rhetoric show that it is not relying upon any general doctrine proscribing broadcaster choice in presenting public issues

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range of individual opinions are expressed on WTOP by commentators, persons appearing on interview programs, subjects quoted in the news, officials and candidates whose speeches are broadcast, and similar advocates (see A. 313-15). Any listener or viewer knows that the same is true on other broadcast stations.

[13]For example, BEM asserts that "standards of deference to the reasonableness and good faith of the licensee could be operative" to implement the guidelines under its new regime, and it indicates that licensees should be able to adopt "reasonable regulations" relating to editorial advertising. BEM Br. 61 & n. 87. It states that a licensee who carries the editorial advertisements "could limit the number of such announcements . . . ." *Id.* 58. It also declares that "obviously licensees could prevent illegal materials such as obscene or defamatory editorials from being broadcast." *Id.* 63 n. 91.

but is instead advocating for them a different structure and format.

BEM repeatedly asserts that WTOP's policy of treating public issues in program time and not in advertising time constitutes an impermissible "discrimination" against public issues and in favor of commercial messages. WTOP showed in its opening brief (pp. 45-52) that this difference in treatment was not a discrimination in any invidious sense: the policy is reasonably designed to achieve a balance of conflicting views on controversial issues, to avoid discrimination among proponents of differing views, to promote rational exposition in preference to propaganda, and to minimize governmental intrusion into the broadcasting process. BEM does not seriously attempt to show that the station's policy lacks a rational basis.

Instead, BEM asserts flatly that it is impermissible for the government to make choices of any kind based upon "the *content* of the speech," so that it is *ipso facto* unlawful for a station to distinguish between spot announcements tendered to it depending upon whether they are commercial or editorial in nature. BEM Br. 16. See also *id.* 18-20. BEM's supposed constitutional doctrine is insupportable. It ignores the laws relating to obscenity, breach of the peace, and espionage. It conflicts with the long-standing distinction drawn by the Communications Act between the treatment of messages by or on behalf of candidates, which are governed by equal time requirements under Section 315, 47 U.S.C. §315, and most other public issues, which are subject to the fairness doctrine. It defies the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which upheld rules designed to establish a right of reply in certain limited categories of cases–candidate endorse-

ments and personal attacks–defined explicitly by their content. BEM elsewhere recognizes that distinctions based on content would have to be made by broadcasters (*e.g.*, to limit domination by particular viewpoints and to avoid defamation) even if its own regime were adopted (see p. 13, *supra*); as a matter of fact BEM's approach would greatly multiply the occasion for such choices by the stations and, accordingly, for oversight and intervention by the government.

BEM's principal authority for its position is *Police Department v. Mosley*, 40 U.S.L. Wk. 4877 (June 26, 1972). In that case this Court struck down an ordinance that, without plausible justification, permitted picketing near schools when addressed to certain labor disputes while prohibiting it in comparable circumstances when directed to any other issue. Here, WTOP's policy does not provide inferior treatment for the subject or viewpoint which concerns BEM nor for controversial issues taken as a class. The station's policy is reasonably designed to assure balanced and effective presentation of controversial issues and viewpoints and seeks to achieve the very objectives of the First Amendment. Thus, even if state action is attributed to WTOP, there is a world of difference between the situation here and that in the *Mosley* case.[14]

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[14] *Mosley* might be apt–assuming that a broadcast station were taken to engage in state action–if a station systematically and without justification excluded either a public issue or a viewpoint on such an issue from the airwaves. In the present case, of course, WTOP has established that it devoted extensive treatment to the Vietnam war and to the various positions taken on it including that of BEM. If this were not so, it would be unnecessary to reach the constitutional issue under *Mosley* since a remedy would lie under the fairness doctrine and related Commission requirements.

Contrary to BEM's assertion (BEM Br. 31-32), WTOP's policy does not prefer or elevate "commercial" advertising above "political" speech. Just as spot announcement time is confined to commercial messages, so political and other non-commercial subjects dominate program time, where commercial advertising is excluded. Partisan or committed voices are heard in programming, just as sponsors are in commercial advertising. Station controls are maintained on commercial messages and the time involved is not, as BEM suggests, relinquished for the advertiser to use as he will (WTOP Br. 51); similarly, program time must be subject to ultimate broadcaster control and responsibility.[15] In every meaningful respect–for example, the total amount of time devoted, the station's own efforts and expenditures, the attention paid to balance of viewpoints, and the ascertaining of community interests–public issues are treated with far greater favor than commercial messages.

In the present case WTOP has in fact expressed the very views advocated by BEM, together with the views expressed by many others holding different opinions about the Vietnam war. The constitutional deficiencies in BEM's argument would scarcely be less, however, even if the issue involved were one the station had reasonably determined in the exercise of journalistic judgment was

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[15] All broadcasting, whether programming or commercial messages, is the responsibility of the broadcaster. BEM's reference to "brokering" of station time (BEM Br. 32-33 n. 51) fails to mention that the station is required by the FCC to retain this responsibility even if another undertakes to assemble programming or advertising for particular periods of time. See *Masters Broadcasting Corp.*, 6 P & F R.R. 621 (1950); *Voice of Brooklyn, Inc.*, 8 F.C.C. 230 (1940).

one that need not be covered at all, in light of other subjects pressing for attention and the limited amount of time available to do them justice. No broadcast station could conceivably accommodate all of those who have causes to urge nor could it possibly provide substantial coverage of every one of the countless issues that might prove to be of interest to one segment of the community or another.[16] Under *Red Lion*, the critical requirement is that a reasonable effort be made to cover noteworthy subjects and, when a subject is treated by a station, a good faith effort be made to treat it fairly and effectively, just as WTOP has done in this instance.

Journalistic choices in broadcasting—whether they relate to the issue to be covered, the use of partisan or dispassionate speakers, or the format—involve a difficult and interrelated journalistic evaluation. The ultimate responsibility for the choices is lodged in independent broadcasters subject to the fairness doctrine and other substantial requirements imposed by the Commission. The alternative is to locate responsibility for these choices in the government itself, whether in an administrative agency or in the courts. The difficulties and dangers of this approach are the same regardless of what aspect of broadcasting is withdrawn from the individual station and committed to a centralized organ of government.

Unlike DNC, BEM does not make an independent argument that the public interest standard of the

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[16]Naturally a station could not, under its statutory obligation to operate in the public interest, arbitrarily choose to ignore an issue of genuine public concern. See *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 998 (D.C. Cir. 1966). No such action is involved here.

Communications Act compels the result reached below even if the Constitution does not.[17] For the reasons given in WTOP's opening brief (pp. 34-44), any such claim would be without merit in view of the very broad discretion confided to the Commission by the Communications Act; the thrust of the congressional policy embodied in Section 3 (h) of the Act, 47 U.S.C. § 153(h), providing that broadcasters are not common carriers; the Commission position followed for many years that the broadcaster bears responsibility for determining the manner and format of presenting issues, subject to the fairness doctrine and special statutory obligations; and the weighty policy arguments against the approach urged by BEM. These circumstances show that, whatever the Commission may decide as an exercise of its expert judgment in the current proceeding reevaluating the fairness doctrine, the Communications Act certainly does not compel the Commission to require the carriage of editorial advertisements.

BEM does, however, invoke three of the same FCC decisions principally relied upon by DNC to support its statutory argument.[18] Whereas DNC regards these decisions as a longstanding interpretation of the statute favorable to it, BEM invokes them as expressing a

[17] DNC also differs from BEM in suggesting in its brief (p. 8, n. 6) that the lower court's opinion requires the sale of program time as well as spot advertising time to those wishing to express their views on public issues. It is sufficient to note that the lower court confined itself to advertising time (A. 464-65), its equal protection rationale generally has no application to program time, and DNC filed no petition for certiorari so that it cannot attack the judgment below as unduly restrictive.

[18] *United Broadcasting Co.*, 10 F.C.C. 515 (1945); *Robert Harold Scott*, 11 F.C.C. 372 (1946); *Homer P. Rainey*, 11 F.C.C. 898 (1947).

principle that "the Commission cannot at this late date repudiate" in the absence of "some reasoned and compelling justifications" (BEM Br. 66-67 & n.95). It is not clear how BEM's claim, which is squarely grounded in the First Amendment (BEM Br. 1), can be advanced by citation to agency decisions construing statutory standards. In any event, the three cited decisions rendered over twenty-five years ago establish no principle that the Commission has abandoned here.

Two of these cases are so remote from the present matter, both in their facts and their statements, that they scarcely deserve discussion.[19] In the remaining case—*United Broadcasting*—the Comission dismissed a charge of station bias in light of a compromise between the complainant and the licensee. The Commission made general observations about the public interest which were not directed to editorial advertising as such and certainly the Commission did not hold that editorial advertisements must be sold.[20] To derive from that case any such

[19] In the *Scott* case, the Commission in dicta cautioned that the views of atheists should not be excluded from the airwaves because they were unpopular or held only by a small minority of people. In *Rainey*, the Commission dismissed a proceeding relating to political broadcasts after stating that time allocations for such broadcasts should be made with due regard to the demands of the public interest in the particular campaign. Both cases were directed to the fairness and adequacy of the coverage of particular subjects rather than the means or format involved.

[20] The principal language relied on by BEM is the statement that it would not comport with the public interest to refuse to sell any time for the discussion of controversial public issues. 10 F.C.C. at 518. Taking the decision as a whole, it reveals that the Commission's basic concern was with the balanced and effective coverage of public issues and not with whether the station achieved this end by selling time or through other coverage which assured a balance of partisan viewpoints on controversial issues. In fact, the

obligation to sell time for editorial advertising would be inconsistent with the approach taken by the Commission in decisions both before and since *United Broadcasting*. WTOP Br. 37-38. In any event, the Commission has thoroughly and reasonably explained the reasons for its position in the present case and could not be foreclosed by *United Broadcasting* however its dicta there were read today. See *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

III. RECENT DECISIONS OF THIS COURT CONFIRM THAT THE STATE ACTION CONCEPT DOES NOT PROPERLY APPLY TO BROADCASTING POLICY JUDGMENTS MADE BY INDIVIDUAL STATIONS AND NEITHER INSTIGATED NOR COMPELLED BY THE COMMISSION.

BEM concedes that the First Amendment was directed not to private action but to "governmental" limitations and regulations relating to speech. BEM Br. 14. Although its brief intermittently refers to the policy of WTOP not to air editorial advertisements as that of "the Government and its licensees" (*id.* 17) and states that the crucial question here is whether "the government" can engage in a process of "authoritative selection" (*id.* 26), the Commission's opinion in this case and the varying practices of individual stations respecting editorial advertising demonstrate that the challenged policy has not been required or mandated by the Commission but is entirely based on WTOP's journalistic judgment. See

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compromise set forth by the Commission expressed the licensee's intention to cover public issues "primarily on a sustaining basis." *Id.* at 517.

WTOP Br. 52-53. BEM implicitly recognizes this fact in an extensive argument attempting to show that the action of WTOP constitutes state action. BEM Br. 69-82.

Although BEM disclaims reliance on "magic formula" for determining when seemingly private entities are engaged in state action (BEM Br. 70), it invokes three such formula by alleging that state action exists here because broadcasters are licensed and regulated, because the Commission "approved" WTOP's policy, and because of the "importance" of broadcasting as a medium. These arguments and the principal relevant authorities are discussed in WTOP's opening brief (pp. 52-62). It is thus necessary only to comment briefly upon BEM's argument and to consider two major state action decisions of this Court handed down late last Term after WTOP's opening brief had been prepared.

BEM argues that licensing and regulation by the state convert decisions of the private entity so licensed or regulated into state action. BEM's brief (p. 70) appears to derive this asserted test principally from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), which did not adopt it.[21] Two other decisions BEM cites

[21] In *Burton*, the Court held unlawful racial discrimination practiced by a restauranteur who leased his location from the state within the confines of a large municipal parking garage operated by the state. The Court did not lay down any general rule relating to licensing and regulation as bases for a state action finding and, indeed, warned that "the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." 365 U.S. at 725. The Court found that because of the physical location of the restaurant inside a state facility, the financial support afforded by the state in constructing the restaurant and other relevant factors, the state had placed "its power, property and prestige behind the admitted discrimination." *Id.* at 724-25.

for the same proposition (BEM Br. 70-71)—the *Moose Lodge* and *Lloyd* cases discussed below—actually rejected state action arguments and the former contains language directly contrary to the "licensing and regulation" formula for state action advanced by BEM. See pp. 23-24, *infra*. The argument made by BEM would extend and dilute the state action concept to apply it to almost every decision of government licensed businesses, individuals licensed in one of the professions, tax-exempt foundations and a host of other entities licensed and regulated by the state. It is significant that BEM makes little attempt to distinguish such cases.

The further argument that the Commission has specifically "approved" the policy of WTOP here involved is based on a misconception of the facts. The Commission did not prompt WTOP's policy, has not required it, and has explicitly emphasized that stations following contrary policies are free to do so. There is no merit to BEM's bootstrap argument that approval should be inferred because, at BEM's own request, the Commission investigated BEM's fairness complaint and its other allegations and determined that they provided no basis for Commission intervention. BEM Br. 79-81. If the question of Commission "approval" is decisive, it must be tested by what the Commission has actually said and not by the Alice-in-Wonderland notion that the Commission has encouraged or required everything it has not affirmatively forbidden.

BEM's final formula rests on the puzzling proposition that state action is involved simply because radio is an important medium of communication. See BEM Br. 81-82. There is no apparent relationship between the importance of the medium and the presence or absence of state action, and BEM's argument simply invites

analytic confusion. It compounds that confusion by addressing the argument to the importance of "the broadcast medium" as if it were abstract monolith (BEM Br. 81-82). In fact, what is at issue here is a particular policy followed by some stations and rejected by others.

Two decisions of this Court in June 1972 deserve special consideration because they represent the latest exposition and analysis of the state action concept. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Lloyd Corp. v. Tanner*, 40 U.S.L. Wk. 4829 (June 22, 1972). BEM seeks to distinguish both decisions which held that state action was not present. There are necessarily factual differences between those cases and the present one including differences that are unfavorable to BEM, such as the presence of racial discrimination in *Moose Lodge* and the physical integration of the shopping center in *Lloyd* with surrounding public property. These decisions are pertinent here, however, not because of precise factual analogies but because of what this Court said in them about the general principles of state action and its own prior decisions.

In *Moose Lodge*, the Court made clear that a regulatory relationship between the state and the entity sought to be pinned with the state action label is not enough, even if the regulation as such may be very substantial.[22] The

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[22] In that case, this Court noted without disagreement the trial court's finding that there was "pervasive" regulation of such private clubs by the Pennsylvania Liquor Control Board. Among other examples, it was noted that such clubs must be licensed, must make physical alterations at the agency's request, must file lists of names and addresses of members and employees, must maintain extensive financial records, and must make club premises available for agency inspection. See 407 U.S. at 176.

Court noted that a test based on the existence of a regulatory relationship in the abstract "would utterly emasculate the distinction between private as distinguished from State conduct" followed for over a century. 407 U.S. at 173. It reaffirmed, as *Burton* itself indicates, that that decision was never intended to make licensing or regulation as such the touchstone of state action. *Id.*

The Court directed attention instead to the question whether the state intervention or regulation required, fostered, or instigated the *particular* conduct challenged as impermissible under the Constitution. 407 U.S. at 176-77. The opinion made plain that it is not state regulation considered at large that is decisive but whether the state has "significantly involved itself with invidious discriminations." *Id.* at 173 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). Thus, what is significant is the fact that however closely the FCC may regulate transmitter power, personal attacks, or other aspects of broadcasting not here involved, it does not purport to dictate or govern a station's policy on the sale of time for editorial advertising. The Commission has made clear that that question is left to each station to decide for itself.

The other recent decision of this Court—the *Lloyd* case—shows that the lower court erred in its contention that a broadcast station's action is state action because of "the importance and suitability of that enterprise for the communication of ideas" (A. 459, 463-64). *Lloyd* shows that the presence of an audience and the feasibility of communicating are not themselves characteristics that convert an enterprise into a public forum subject to the same First Amendment constraints that apply to the state itself. At the same time the Court explicitly limited its earlier decision in *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), a decision

on which the court below in this case heavily relied (A. 463-64).

Finally, BEM has not and cannot explain how, if WTOP's present course comprises state action, the courts can avoid plenary constitutional review of every broadcaster determination to accept or reject a particular editorial advertisement. Indeed, decisions by broadcasters on any other facet of editorial or administrative operation would apparently be equally subject to challenge on First Amendment, equal protection, or due process grounds. While stating generally that litigation of constitutional issues is to be "welcomed" (BEM Br. 60), BEM does assert that litigation in the courts over particular determinations whether to accept or reject editorial advertisements would involve only "a garden variety review of administrative action . . . ." *Id.* 55 & n.76. Having once summoned the genie out of the bottle, the cork cannot be so readily replaced; BEM's brief gives no reason why the "abridgeable" First Amendment right it relies on here will not be equally available to those who follow.

BEM's own brief foreshadows what its position would actually be when and if a new "abridgeable" constitutional right is established and broadcasters throughout the country are faced with the task of determining whether particular advertisements should be aired. Thus, BEM asserts that it is "anathema to First Amendment interests" for broadcasters to assert an interest in "keeping frivolous, unimportant, or crackpot speeches off the air." BEM Br. 54 n.75. It apparently conceives as "censorship" any broadcaster determination that material is misleading, scandalous or indecent. *Id.* 23. It disparages any station policy or desire not to transmit what is "unduly inflammatory, offensive or otherwise unsuitable

for broadcasting into the home." *Id.* These assertions undercut BEM's more general statements that its new regime would permit ample broadcaster and agency flexibility (*e.g.*, BEM Br. 55 & n. 76, 60-61) and show that the First Amendment would be summoned forth at every turn.

Once there were established a constitutional "right" to require carriage of editorial advertisements, the agency's task of oversight would be vastly complicated by the necessity of applying fixed constitutional doctrines derived in situations remote from the regulated area. The courts would also be implicated to an extent never before necessary, for there would be no dearth of litigants to urge that "courts—and not administrative agencies—are the appropriate arbiters of constitutional disputes" (DNC Br. in Opp. 19). Even Congress would be constrained in altering the regime if it were premised on a state-action determination that applies the requirements of the First Amendment.

If the lower court's state action ruling is upheld, ultimately this Court will have to decide what is and is not permissible in the field of broadcast editorial advertising on a case-by-case basis. This responsibility will extend to considering specific advertisements—whose range and variety are potentially unlimited—no less than the standards, exceptions and procedures broadcasters attempt to devise to cope with the problems in the first instance.[23] Given the demands on this Court's time and attention and the existence of an elaborate statutory regime for broadcasting, it is difficult to conceive of any endeavor less necessary and less appropriate than the

[23] See, *e.g.*, *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

super-agency role that BEM's argument would assign to this Court.

CONCLUSION

For the reasons stated the decision below should be reversed.

Respectfully submitted,

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